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In the Supreme Court of the United States

OCTOBER TERM, 1992

CRITICAL MASS ENERGY PROJECT, PETITIONER

v.

NUCLEAR REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether reports that are submitted by a private person to a federal agency on a voluntary basis, and that are not customarily made public by the submitter, are exempt from mandatory public disclosure under Exemption 4 of the Freedom of Information Act, 5 U.S.C. 552(b)(4), which protects "trade secrets and commercial or financial information obtained from a person and privileged or confidential."

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-33a) is reported at 975 F.2d 871. The opinion of the court of appeals panel (Pet. App. 72a-89a) is reported at 931 F.2d 939. The opinion of the district court (Pet. App. 65a-71a) is reported at 731 F. Supp. 554. A prior opinion of the court of appeals (Pet. App. 42a-64a) is reported at 830 F.2d 278. A prior opinion of the district court (Pet. App. 36a-41a) is reported at 644 F. Supp. 344.

JURISDICTION

The judgment of the en banc court of appeals (Pet. App. 34a-35a) was entered on August 21, 1992. On October 7, 1992, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including December 19, 1992. The petition was filed on December 17, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Freedom of Information Act (FOIA), 5 U.S.C. 552, mandates disclosure upon request of a broad range of materials in the possession of federal agencies. The disclosure requirements, however, are subject to a number of exemptions. This case involves Exemption 4, which protects from compelled disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. 552(b)(4). In *National Parks & Conservation Ass'n* v. *Morton*, 498 F.2d 765 (D.C. Cir. 1974), the District of Columbia Circuit held that commercial or financial information obtained from a person is "confidential" within the meaning of Exemption 4 "if disclosure of the information is likely * * * (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." 498 F.2d at 770.

The Institute for Nuclear Power Operations (INPO) is a private, voluntary organization of nuclear electric utilities. Pet. App. 6a. In order to assist its members in improving their performance, INPO

develops and provides to its members detailed standards, criteria, and guidelines for the construction, operation, maintenance, and support of commercial nuclear power plants. INPO also conducts evaluations of nuclear plants under construction or operated by member utilities and provides specific findings and recommendations to the utilities. INPO's reports are distributed to its members and to the Nuclear Regulatory Commission (NRC), but they are not made available to the public, because INPO believes that public dissemination would make utility personnel reluctant to provide thorough and candid assessments.[1] This case involves INPO reports containing analyses of significant safety-related events occurring in the construction, testing, or operation of specific nuclear plants. The reports are intended to assist in correcting the causes of recurring events and identifying warning signs of more serious potential events.[2]

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[1] INPO distributes the reports to its members and to the NRC based upon the explicit understanding that the recipient will not disclose them to third parties except with INPO's consent. Pet. App. 45a & n.12.

[2] The information in these INPO reports differs markedly from the information in the Licensee Event Reports (LERs) that licensees must submit to the NRC, pursuant to regulation, within 30 days after discovery of a safety-related event. LERs are publicly available from the NRC. See 10 C.F.R. 50.73(a)(1). An NRC official's declaration in this case explained that, while an LER often contains more detailed technical data concerning an event than appears in an INPO report on the same event, the analogous INPO report contains information and analysis not found in an LER, particularly about the performance of the personnel involved. See Rosenthal Decl. ¶¶ 5, 6.

2. In 1984, petitioner submitted a FOIA request for INPO reports in the possession of the NRC. The NRC denied that request on the ground that the reports are protected from disclosure under Exemption 4. Pet. App. 6a. Petitioner then filed this action, and the district court granted summary judgment for the NRC. *Id.* at 36a-41a. Applying the *National Parks* test, the district court held that the reports are confidential because their disclosure would impair the NRC's access to necessary information in the future. See *id.* at 40a-41a.

3. The court of appeals reversed and remanded for further proceedings. Pet. App. 42a-64a. The court of appeals found that the reports in question are not customarily released to the public. *Id.* at 49a. It held, however, that the record failed to show whether disclosure would damage the particular interests that, under *National Parks*, justify invocation of Exemption 4. *Id.* at 50a-57a. The court therefore remanded for further evidentiary proceedings on several issues, including (1) whether the NRC would be deprived of the reports in the future if INPO ceased to submit them to the agency voluntarily, and (2) whether the NRC's use of any alternative means of obtaining the reports would pose a significant risk that their quality and usefulness to the NRC would be diminished. *Id.* at 52a, 59a-61a.

4. On remand, the district court permitted INPO to intervene as a defendant and granted summary judgment for the NRC and INPO. Pet. App. 65a-71a. The court noted that "both NRC and INPO share the conviction" that disclosure of the reports would impair the NRC's ability to obtain candid information

and analyses in the future. *Id.* at 70a. The court found it unnecessary to resolve that issue, however, holding instead that the reports satisfied the *National Parks* test because their disclosure would damage the working relationship between the NRC and INPO. The court reasoned that disclosure of the requested reports would require the NRC to employ coercive means to obtain INPO reports in the future. In the court's view, the acrimony and litigation that would attend the NRC's efforts to do so would convert INPO and the agency into "wary allies, working independently of one another, duplicating one another's efforts, and mistrustful of one another's initiatives or overtures." According to the court, that result would, in turn, impair the agency's efficiency and effectiveness. *Id.* at 71a.

5. A panel of the court of appeals again reversed and remanded, concluding that the agency had not established a basis for withholding under *National Parks*. Pet. App. 72a-89a. Although the record included affidavits of NRC officials, INPO officials, utility executives, and independent consultants stating that disclosure would likely cause a qualitative impairment of the reports by discouraging candor on the part of utility employees interviewed in connection with the reports, the panel discounted that evidence as "self-interested speculations by officials of the entities resisting disclosure." *Id.* at 86a. The panel stated that, under *National Parks*, the confidentiality of records must be established by "testimony from working-level employees regarding the importance of confidential treatment of INPO

reports to their willingness to speak to INPO analysts." *Id.* at 85a.

In a concurring opinion, Judge Randolph, joined by Judge Williams, agreed that the result reached by the panel was compelled by circuit precedent. Pet. App. 89a. He concluded, however, that the INPO reports are confidential under the plain meaning of that term, and that *National Parks* had "'fabricated, out of whole cloth' * * * an additional requirement that must be met before confidential information is exempt from disclosure." *Id.* at 88a.

6. At the suggestion of the NRC and INPO, the court of appeals vacated the panel's decision and ordered that the case be reheard en banc. Pet. App. 90a-91a. The NRC and INPO argued that the test announced in *National Parks* is inconsistent with the text and history of Exemption 4, and that *National Parks* should therefore be overruled. Petitioner argued that the *National Parks* test should be retained. No party specifically contended that the application of Exemption 4 to information voluntarily submitted to an agency should be governed by a test different from that applicable to information submitted to the agency under compulsion.[3]

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[3] Petitioner acknowledged that "[a]s an intuitive matter, it might seem sensible to establish a bright-line rule that information obtained voluntarily from a party should always be exempt from disclosure," Critical Mass En Banc C.A. Br. 37, but argued that such a rule should not be adopted, *id.* at 37-39. INPO contended that "[w]ithout at least some assurance that the documents will remain confidential, private parties will be discouraged from voluntarily submitting confidential information—a result that is flatly contrary to the purpose of Exemption 4." INPO En Banc C.A. Br. 27. INPO did not argue,

The en banc court affirmed the judgment of the district court, holding that the requested reports are protected from disclosure under Exemption 4. Pet. App. 1a-33a. The court first concluded that, under the principle of *stare decisis*, the holding in *National Parks* should be reaffirmed, albeit with correction of "some misunderstandings as to its scope and application." *Id.* at 9a. In declining to overrule *National Parks*, the court cited the widespread acceptance of the *National Parks* test by other courts of appeals and Congress's "cognizance" of *National Parks* in the legislative history of several other statutes containing exemptions comparable to Exemption 4 of the FOIA. *Id.* at 11a-12a. The court below also concluded that "*National Parks* has not proven so 'unworkable' in practice as to constitute a 'positive detriment to coherence and consistency in the law' or a 'direct obstacle to the realization of important objectives embodied in other laws.'" *Ibid.* (quoting *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 173 (1989)).

The court of appeals declined, however, to extend *National Parks* to situations where, as here, the requested information was submitted *voluntarily* to

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however, that disclosure of voluntary and compelled submissions should be governed by different legal tests. The NRC's brief discussed the somewhat different question of whether an agency's access to information has been "impaired" within the meaning of *National Parks* if disclosure causes the submitter to cease providing it voluntarily, forcing the agency to rely on coercive means. See NRC En Banc C.A. Br. 26-27; see also *Critical Mass I*, Pet. App. 62a-63a (Buckley, J., concurring in part and dissenting in part); *Critical Mass II*, Pet. App. 89a (Randolph, J., concurring).

the federal agency. Pet. App. 13a-20a. The court explained that when information is submitted to the government under compulsion, its disclosure is unlikely to impair the government's access to similar information in the future; the principal governmental interest is in ensuring the continued reliability of the information. *Id.* at 15a. But when information is submitted voluntarily, the court reasoned, the government's interest in the continued availability of the information is implicated, because "the persons whose confidences have been betrayed will, in all likelihood, refuse further cooperation." *Id.* at 16a. The court also noted that, while the *National Parks* test had frequently been applied to information submitted under compulsion, no similar body of law existed with regard to voluntarily submitted records. See *id.* at 18a. The court then concluded:

> Accordingly, while we reaffirm the *National Parks* test for determining the confidentiality of information submitted under compulsion, we conclude that financial or commercial information provided to the Government on a voluntary basis is "confidential" for the purpose of Exemption 4 if it is of a kind that would customarily not be released to the public by the person from whom it was obtained.

Ibid. Applying that test, the court held that the INPO reports are protected from disclosure by Exemption 4. *Id.* at 19a.[4]

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[4] The court stated: "[W]e agree with the district court's conclusion that the information [the INPO reports] contain is commercial in nature; that the reports are provided to the

ARGUMENT

Although the proper standard for determining whether information is "confidential" within the meaning of Exemption 4 might someday merit this Court's consideration, further review of the present case is unwarranted. First, the decision below, sustaining the NRC's withholding of the INPO reports, is correct. The D.C. Circuit's application of Exemption 4 to cases involving voluntarily submitted information is consistent with the plain language of the exemption and the interests that it is designed to protect, and it correctly recognizes that mandatory public disclosure of such information is particularly likely to impair the government's ability to obtain similar submissions in the future. For that reason, although the en banc court's disposition rendered it unnecessary to reach the issue, the INPO reports were properly withheld even under the *National Parks* test that petitioner urges.

Second, there is no conflict among the courts of appeals that requires the Court's attention at this time. The distinction drawn by the D.C. Circuit between voluntarily and involuntarily submitted information has not been adopted or rejected by any other court of appeals because it has not been considered by any other court of appeals; until it can be determined whether other courts will find the D.C. Circuit's analysis persuasive, review by this Court

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NRC on a voluntary basis; and that INPO does not customarily release such information to the public. On the basis of these findings, we hold that the INPO reports are confidential within the meaning of Exemption 4 and therefore protected from disclosure." Pet. App. 19a (citations omitted).

would be premature. For much the same reason, petitioner's speculation that the D.C. Circuit's rule concerning voluntarily submitted information may present practical difficulties in the future does not furnish a basis for disturbing the court of appeals' disposition of this nine-year-old FOIA case.

1.a. The en banc court of appeals held that financial or commercial information voluntarily submitted to a federal agency is "confidential" within the meaning of Exemption 4 "if it is of a kind that would customarily not be released to the public by the person from whom it was obtained." Pet. App. 18a. That test is fully consistent with the language and the legislative history of the FOIA. According to Webster's first definition, information is "confidential" if it is "communicated, conveyed, acted on, or practiced in confidence: known only to a limited few: not publicly disseminated." *Webster's Third New International Dictionary* 476 (1986). See also *The Random House Dictionary of the English Language (Second Edition)* 428 (1987) (defining "confidential" as, *inter alia*, "limited to persons authorized to use information, documents, etc., so classified"); *Critical Mass II*, Pet. App. 88a (Randolph, J., concurring).

The legislative history of the FOIA both confirms that Congress intended the word "confidential" in Exemption 4 to have its usual meaning and supports the court of appeals' formulation. Thus, the Senate Report states:

> This exception is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries but which would customarily not be

> released to the public by the person from whom it was obtained.

S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965). The House Report similarly state:

> This exemption would assure the confidentiality of information obtained by the Government through questionnaires or through materials submitted and disclosures made in procedures such as the mediation of labor-management controversies. It exempts such material if it would not customarily be made public by the person from whom it was obtained by the Government.

H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966) (footnote omitted). Petitioner makes no attempt to demonstrate that the en banc court's test for the confidentiality of voluntarily submitted information is inconsistent with the statutory language. Nor does petitioner identify any legislative history suggesting that Congress intended the language to have some other meaning.

b. A separate question is presented by the en banc court's reaffirmation—technically in dicta—of the further showing *National Parks* required for withholding commercial or financial information that was submitted to a federal agency under compulsion —namely, that disclosure would be likely "(1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." 498 F.2d at 770 (footnote omitted). The D.C. Circuit in *National Parks* did not purport to draw upon ordinary

meanings of the word "confidential" in formulating that standard; it instead ruled that invocation of Exemption 4 is appropriate only if "non-disclosure is justified by the legislative purpose which underlies the exemption." *Id.* at 767. In urging below that *National Parks* be overruled, we contended that the D.C. Circuit had erred in that case in imposing this additional, extra-textual requirement, and the en banc court below in fact refrained from stating that *National Parks* had been correctly decided. It chose to adhere to *National Parks* only as a matter of *stare decisis*. See Pet. App. 9a-13a; see also *id.* at 21a-24a (Randolph, J., joined by Silberman & Sentelle, JJ., concurring) (expressing the view that *National Parks* was wrongly decided but agreeing that the case should not be overruled).

This aspect of the en banc court's opinion does not warrant further review. Even if the continued applicability of *National Parks* to information submitted to the agency under compulsion were otherwise suitable for this Court's consideration, the present case would be an inappropriate vehicle for resolving that issue, since there can be no serious question that the requested INPO reports were voluntarily submitted to the NRC.[5] Not surprisingly, moreover, petitioner does not ask the Court to grant certiorari for the purpose of holding that the D.C.

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[5] Petitioner acknowledges (Pet. 20 n.5) that "the information on the INPO system is submitted voluntarily." Similarly, the dissenters on the en banc court did not suggest that INPO's submission of the reports to the NRC was involuntary. See Pet. App. 25a-33a.

Circuit erred in declining to overrule *National Parks*.[6]

c. The en banc court below was on solid ground, however, in declining to extend the *National Parks* test to information submitted voluntarily to a federal agency. Although the *National Parks* test has been applied repeatedly by the D.C. Circuit and has been adopted by other courts of appeals, petitioner has identified only one appellate decision in which that test was applied to information submitted to the agency on a voluntary basis. See Pet. 13-14 (citing *9 to 5 Organization for Women Office Workers* v. *Board of Governors of the Federal Reserve System*, 721 F.2d 1 (1st Cir. 1983)). Nor had the D.C. Circuit itself applied the *National Parks* test to voluntarily submit information prior to the instant dispute.[7]

The en banc court was also correct in concluding that compelled disclosure of voluntarily submitted information is particularly likely to impair the government's access to similar information in the future. When information is submitted to the government under compulsion, there is little danger that disclosure of the information to third parties pursuant to the FOIA will hinder the government's

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[6] If this Court were to grant review, we of course would be entitled to argue, in support of the judgment below, that the Court should not approve the *National Parks* test for *any* information withheld under Exemption 4, whether it was submitted to the agency voluntarily or under compulsion.

[7] See Pet. App. 18a ("we know of no case considered by this court in the past, other than *Critical Mass I* and *II*, that would have been decided differently" under the test announced by the en banc court).

efforts to obtain similar information at a later date. The primary governmental interest in that context is in ensuring the continued reliability of the information. See Pet. App. 15a. But when information is provided to the government voluntarily, the "presumption" is that the government's interest in the continued availability of the information will likewise be threatened by disclosure, "as the persons whose confidences have been betrayed will, in all likelihood, refuse further cooperation." *Id.* at 16a.[8] We may assume that persons who have voluntarily submitted information with the understanding that it will not be disseminated to third parties will *sometimes* continue to submit similar information even after that understanding has been breached. But the en banc court correctly determined that the likelihood of such conduct is sufficiently slight—and the importance of workable rules sufficiently great, see *id.* at 17a (citing *United States Dep't of Justice* v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 779 (1989))—that a categorical rule is justified in cases involving voluntarily submitted information that the submitter does not customarily make public.

2. Petitioner contends (Pet. 14) that the decision below conflicts with the First Circuit's decade-old decision in *9 to 5 Organization for Women Office Workers*. Petitioner points out (Pet. 18) that the

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[8] See also Pet. App. 18a ("It is a matter of common sense that the disclosure of information the Government has secured from voluntary sources on a confidential basis will both jeopardize its continuing ability to secure such data on a cooperative basis and injure the provider's interest in preventing its unauthorized release.").

information at issue in *9 to 5* was voluntarily submitted but that the First Circuit nevertheless remanded to the district court for application of the *National Parks* test. Petitioner appears to be correct that the First Circuit's disposition of *9 to 5* would have been different if it had adopted the legal standard applied by the en banc court in the present case. That different disposition in *9 to 5*, however, does not warrant review in this case.

The First Circuit in *9 to 5* did not consider the contention that a standard other than the traditional *National Parks* test should apply because the information in question was submitted to the federal agency on a voluntary basis. Indeed, although it seems clear that the information at issue in *9 to 5* was submitted voluntarily, the court's opinion does not even mention that fact. If the First Circuit is squarely presented with the question in the future, it is entirely possible that it will adopt the D.C. Circuit's approach with respect to voluntarily submitted records. In any event, review of that issue by this Court at the present time would be premature. After other courts of appeals have had an opportunity to consider the analysis adopted by the D.C. Circuit in the present case, this Court will be better able to determine whether the issue warrants review.

3. Petitioner speculates that the distinction between voluntary and mandatory submissions will be difficult to apply (Pet. 14-19); that it will lead federal agencies to arrange for voluntary submission of information so as to thwart the purposes of the FOIA (Pet. 19-21); and that the decision below may have deleterious consequences as applied to reverse-FOIA

actions (Pet. 23-25).[9] Such speculation about future developments scarcely furnishes a basis for review by this Court now. The accuracy of petitioner's predictions simply cannot be determined until the lower courts have acquired greater experience in applying the en banc court's analysis. In light of the paucity of judicial experience in applying the *Critical Mass* analysis in subsequent cases—an experience thus far confined to the district courts[10]—review at the present time would be premature.

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[9] Petitioner also challenges in passing the court of appeals' conclusion that the INPO reports at issue here constitute "commercial" information within the meaning of Exemption 4. See Pet. 23. That holding, first announced in the initial panel opinion and subsequently reaffirmed by the en banc court, see Pet. App. 46a-47a, 19a, is fact-specific, does not conflict with the decision of any other court of appeals, and does not warrant review by this Court. We would urge the Court to deny review on that issue even if it were to grant certiorari on whether the information is "confidential," since if the Court were to hold that the INPO reports do not constitute "commercial" information, the broader issue of confidentiality would remain unresolved.

[10] We are aware of five district court decisions involving the application of *Critical Mass*. See *Cohen, Dunn & Sinclair, P.C.* v. *GSA*, Civ. Action No. 92-0057-A (E.D. Va. Sept. 10, 1992); *Allnet Communication Services, Inc.* v. *FCC*, 800 F. Supp. 984 (D.D.C. 1992); *Environmental Technology, Inc.* v. *EPA*, Civ. Action No. 3:92CV363 (E.D. Va. Jan. 21, 1993); *McDonnell Douglas Corporation* v. *Rice*, Civ. Action No. 92-2211(JHG) (D.D.C. Sept. 30, 1992), motion for reconsideration pending; *Harrison* v. *Lujan*, Civ. Action Nos. 90-1512 & 91-0250 (D.D.C. Dec. 8, 1992). There are as yet no court of appeals decisions applying the standard announced by the en banc court.

In assessing the practicability of the en banc court's approach, moreover, it should be borne in mind that the *National Parks* test itself hardly furnishes the sort of bright-line rule that petitioner believes is appropriate. That test requires an inherently speculative determination as to the likely future interaction between a federal agency and private parties in the event that specified records are held to be subject to mandatory disclosure under the FOIA. The present case illustrates the imprecision of that inquiry: had the court of appeals denied rehearing en banc, the case would have been remanded to the district court for a *third* round of evidentiary proceedings.[11] Insofar as ease of application is relevant in fashioning an appropriate test for determining confidentiality, the standard announced by the en banc court with respect to voluntarily submitted records facilitates rather than hinders the implementation of Exemption 4.[12]

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[11] Application of the *National Parks* test will sometimes involve speculation not simply about the relationship between the government and the submitter, but also about the relationship between the submitter and other private parties. In *Critical Mass II*, for example, the panel remanded for further proceedings to determine whether disclosure of INPO reports would lessen the candor with which utility employees respond to questions posed by INPO personnel. See Pet. App. 85a-87a.

[12] This case need not be held for *United States Department of Justice* v. *Landano*, No. 91-2054 (to be argued Feb. 24, 1993). That case involves Exemption 7(D) of the FOIA, 5 U.S.C. 552(b)(7)(D), which permits the withholding of law enforcement information that "could reasonably be expected to disclose the identity of a confidential source." Although both Exemption 4 and Exemption 7(D) use the word "confidential,"

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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the two Exemptions deal with different problems and, to date, the courts' analyses of the two Exemptions have proceeded on different tracks. See also *Landano* Pet. Reply Br. 10-11 n.7.